LIBRARY
SUPREME COURT, U. S.
FILED
JUL 11 1975

IN THE

Supreme Court of the United States

No. 74-1421

PAUL CASHEN and IRENE CASHEN,

Petitioners,

vs.

FRANK SPANN, ROBERT BICKLEY, CHARLES M. EGAN, JR., JOHN DUNNE, individually and as servant, agent or employee of CHARLES EGAN, JR., "JOHN DOE," being a fictitious name of the "Reliable Informer," NEW JERSEY BELL TELEPHONE COMPANY, ANTHONY DE BIASI, THE COUNTY OF MORRIS and the BOROUGH OF WHARTON,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of New Jersey

BRIEF IN OPPOSITION

Stephen S. Weinstein
Attorney for Respondents, Frank Spann, Robert Bickley and John Dunne
Twenty Park Place
Morristown, New Jersey 07960

Herman M. Kohn
On the Brief

Adams Press Corp., 11 Commerce Street, Newark, N. J. 07102—(201) 621-6611

TABLE OF CONTENTS

	PAGE
PROCEDURAL HISTORY	2
COUNTER-STATEMENT OF FACTS	3
REASONS FOR DENYING THE WRIT	4
POINT I—Under 28 U.S.C. §1257 there was no final judgment or decree, therefore, the court should not exercise jurisdiction	4
POINT II—Jurisdiction should not be exercised inasmuch as the constitutional questions presented are premature and not ripe for decision	9
CONCLUSION	12

Cases Cited

Alabama State Federation of Labor v. McAdory, 325 U. S. 450, 89 L. Ed. 1725, 65 S. Ct. 1384 (1944)	7, 9, 10
Ashwander v. Tennessee Valley Authority (Brandeis concurrence), 297 U. S. 288, 80 L. Ed. 688, 56 S. Ct. 466 (1935)	9-11
Blair v. United States, 250 U. S. 273, 63 L. Ed. 979, 39 S. Ct. 468 (1919)	10
Golden v. Zwickler, 394 U. S. 103, 22 L. Ed. 2d 113, 89 S. Ct. 956 (1969)	9, 10
International Longshoremen's and Warehousemen's Union, Local 37 v. Boyd, 347 U. S. 222, 98 L. Ed. 650, 74 S. Ct. 447 (1953)	11
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 95 L. Ed. 817, 71 S. Ct. 624 (1950)	6, 9
Local No. 483 v. Curry, 371 U. S. 542, 9 L. Ed. 2d 514, 83 S. Ct. 531 (1963)	8
Massachusetts v. Mellon, 262 U. S. 447, 67 L. Ed. 1078, 43 S. Ct. 597 (1923)	12

PAGE

Mercantile National Bank v. Langdeau, 371 U. S. 555, 9 L. Ed. 2d 523, 83 S. Ct. 520 (1963) 8

North Dakota Pharmacy Board v. Snyder's Stores, 414 U. S. 156, 38 L. Ed. 2d 379, 94 S. Ct. 407 (1973) 6-8

Pichler v. Jennings, 347 F. Supp. 1061 (S. D. N. Y. 1972) 7

Poe v. Ullman, 367 U. S. 497, 6 L. Ed. 2d 989, 81 S. Ct. 1752 (1961) 9, 12

Radio Station WOW, Inc. v. Johnson, 326 U. S. 123, 89 L. Ed. 2092, 65 S. Ct. 1475 (1944) 5, 7, 8

Republic Natural Gas Co. v. Oklahoma, 334 U. S. 62, 92 L. Ed. 1212, 68 S. Ct. 972 (1947) 4, 6-8

Rescue Army v. Municipal Court City of Los Angeles, 331 U. S. 549, 91 L. Ed. 1666, 67 S. Ct. 1409 (1946) 9

United Public Workers v. Mitchell, 330 U. S. 75, 91 L. Ed. 754, 67 S. Ct. 556 (1946) 10, 11

Wheeler v. Barrera, —— U. S. —— 41 L. Ed. 2d 159, 94 S. Ct. 2274 (1974) 11

Statute Cited

28 U.S.C.:

Sec. 1257 ..... 4, 5

Sec. 1257(3) 5

Rule Cited

R. 4:10-3 6

Other Authority Cited

73 Yale L. J. 515, 516, 523, 526 (1964) 5, 7, 8

IN THE

Supreme Court of the United States

No. 74-1421

PAUL CASHEN and IRENE CASHEN,

Petitioners,

vs.

FRANK SPANN, ROBERT BICKLEY, CHARLES M. EGAN, JR., JOHN DUNNE, individually and as servant, agent or employee of CHARLES EGAN, JR., "JOHN DOE," being a fictitious name of the "Reliable Informer," NEW JERSEY BELL TELEPHONE COMPANY, ANTHONY DE BIASI, THE COUNTY OF MORRIS and the BOROUGH OF WHARTON,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of New Jersey

BRIEF IN OPPOSITION

Procedural History

The plaintiffs, Paul and Irene Cashin, commenced the subject lawsuit in Superior Court, Essex County, against Frank Spann, Robert Bickley, Charles M. Egan, Jr., "John Doe", being a fictitious name of the reliable informant, New Jersey Bell Telephone Company, Anthony DiBiasi, County of Morris and the Borough of Wharton. The original Complaint was filed May 19, 1971 and all defendants properly filed Answers. The plaintiffs then filed an Amended Complaint on December 2, 1971 and this was properly answered as well by all defendants. Venue was transferred to Morris County by an Order entered on September 15, 1971 by the Honorable Brendan T. Byrne, J.S.C.

After all discovery pertaining to the Borough of Wharton was completed, that defendant moved for summary judgment to dismiss the Complaint. Said motion was argued and granted on May 12, 1972. Throughout substantial discovery proceedings by the plaintiffs, these defendants refused to reveal the name of the reliable informant. Consequently, the plaintiffs moved for an Order compelling these defendants to answer Interrogatories requesting said name.

Subsequently, these defendants and defendant New Jersey Bell Telephone Company both moved for summary judgment to dismiss the Complaint. The plaintiffs' and the remaining defendants' motions were argued on June 9, 1972 before the Honorable Alexander P. Waugh, who was at that time Assignment Judge of the Superior Court, Morris County, and is now retired from the judiciary.

The plaintiffs' motion was denied. Both defendants' summary judgments motions were granted.

The plaintiffs appealed from all of the above rulings and no appeal from the summary judgment in favor of the defendant Borough of Wharton was taken. The Appellate Division on November 2, 1973 rendered their decision affirming summary judgment in favor of defendants Prosecutor Egan, DeBiasi, County of Morris and New Jersey Bell Telephone Company and reversing the summary judgment in favor of Bickley, Spann and Dunne. The Court also ordered the disclosure of the identity of the informer referred to in Bickley's affidavit.

Certification was granted by the New Jersey Supreme Court on May 14, 1974. Judgment was rendered on February 25, 1975. Justice Pashman, speaking for a unanimous court, affirmed the Appellate Division as modified. The Court remanded the issue of disclosure of the informant's identity to the trial court for further factual findings assuming the plaintiffs pursued their motion for discovery and the defendants continued to resist disclosure. The plaintiffs have chosen to petition the United States Supreme Court for a Writ of Certiorari rather than pursue any remedy in the trial court.

Counter-Statement of Facts

This civil lawsuit has arisen out of an investigation by these defendants, members of the Morris County Prosecutor's office into illegal gambling activities in the Morris County area. The investigation primarily concerned four individuals, Raymond Dragos, Johnny Gallo a/k/a John Peragallo, Stanley Mosher and Thomas O'Mara, who were, as a direct result of this involved investigation, arrested, indicted and, subsequently, pleaded guilty to various charges of illegal gambling activities.

As a minor part of this investigation, the name Paul Cashen, plaintiff herein, came to the attention of the

Prosecutor's office in a manner, which after being responsibly checked out, gave probable cause for a search of his home, car and person for evidence of gambling activities.

The search warrant in this case was issued by the Honorable Jacques Gascoyne, J.C.C. after a finding by His Honor of probable cause.

The search was properly conducted by the Prosecutor's office with the aid of the Borough of Wharton Police Department and the search revealed no such evidence and the plaintiff's name was then completely stricken from any aspect of the balance of the investigation.

The amended Complaint is grounded in theories of negligence, as well as intentional wrong doing on the part of these defendants. The specific acts alleged are false arrest and imprisonment, slander, libel and assault.

REASONS FOR DENYING THE WRIT

POINT I

Under 28 U.S.C. §1257 there was no final judgment or decree, therefore, the court should not exercise jurisdiction.

The burden of affirmatively establishing the jurisdiction of the United States Supreme Court rests with petitioners. "The policy against premature constitutional adjudications demands that any doubts in maintaining this burden be resolved against jurisdiction." *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 71, 92 L. Ed. 1212, 1221, 68 S. Ct. 972 (1947). Petitioners merely state that juris-

diciton is invoked under 28 U.S.C. §1257(3) without any further substantiation.

Pursuant to 28 U.S.C. §1257, a writ of certiorari can only be granted to review a final judgment or decree rendered by the highest state court.

> "Amendments or statutory exceptions to this rule have never been attempted, in striking contrast to the tendency toward statutory liberalization within the federal and state judiciaries." 73 *Yale L. J.* 515, 523.

> "This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a State Court. Here we are in the realm of potential conflict between the courts of two different governments . . . This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 123, 124, 89 L. Ed. 2092, 2097, 65 S. Ct. 1475 (1944).

The Judgment of the Supreme Court of New Jersey, the highest state court, was entered on February 25, 1975 and is attached to the Petition for Writ of Certioari as Appendix B. The court, in an opinion reported at 66 N. J. 541 (1975), affirmed the judgment of the Appellate Division as modified with respect to disclosure of the identity of the informer. Justice Pashman, speaking for a unanimous court, stated,

> "While we are satisfied that the Appellate Division correctly identified the balancing test to be applied in cases such as this one, we doubt that either the trial court or the Appellate Division had before it an adequate record to actually perform

> the delicate and difficult balancing of interests called for. Hence we vacate the order of the Appellate Division directing disclosure of the identity of the informant."

Cashen, supra, 66 N. J. at 555, Appendix B at 17a. If, on remand, the plaintiffs press their motion to compel discovery and the defendants move for a protective order pursuant to R. 4:10-3 to resist discovery, the trial court would then be required to consider all the facts involved in applying the balancing test. The court then proceeded to suggest factors to be considered in evaluating the interest of the various parties. The judgment of the New Jersey Supreme Court cannot be considered final in light of the remand for additional fact finding.

Although "no self-enforcing formula defining when a judgment is 'final' can be devised," *Republic Natural Gas, supra,* 334 U. S. at 67, 92 L. Ed. at 1219, "government action is 'final' . . . when at no future time will its impact on the petitioner become more conclusive, definite or substantial." *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 155, 95 L. Ed. 817, 844, 71 S. Ct. 624 (1950). In the instant case, the impact on petitioners presently is unknown. It will become more definite when and if the trial court ascertains the necessary facts and applies the balancing test.

> "The finality requirement . . . serves several ends:
>
> (1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controvery' in the sense of Article III; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs." *North*

> *Dakota Pharmacy Board* v. *Snyder's Stores*, 414 U. S. 156, 159, 38 L. Ed. 2d 379, 383, 94 S. Ct. 407 (1973). "It (the finality requirement) avoids the mischief of economic waste and of delayed justice." *Radio Station WOW, supra*, 326 U. S. at 124, 89 L. Ed. at 2097. It ". . . also increases the likelihood that the appellate court will have before it all the facts and issues necessary to reach an informed judgment. In this respect, finality is analogous to ripeness. The record must be sufficiently complete so that issues material to the decision have been determined in the lower courts." 73 *Yale L. J.* 515, 516 (1964).

In the case at bar, the record is not sufficiently complete which is precisely why the New Jersey Supreme Court remanded it to the trial court. This is not a situation where ". . . nothing more than a ministerial act remains to be done, . . . and the decree is regarded as concluding the case and is immediately reviewable." *Republic Natural Gas, supra*, 334 U. S. at 68, 92 L. Ed. at 1219. "The need for factual referents to narrow the issues in a given case is of recognized importance in determining justiciability." *Pichler* v. *Jennings*, 347 F. Supp. 1061, 1066 (S. D. N. Y. 1972). And in another case, the Court would not decide "the constitutionality of a state statute of doubtful construction in advance of its application and construction by the state courts and without reference to some precise set of facts to which it is to be applied." *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 462, 89 L. Ed. 1725, 1735, 65 S. Ct. 1384 (1944). Thus, the remand for further factual determination cannot be dismissed as a mere ministerial act.

Nor does the present case fit within other exceptions to the finality rule. Until fairly recently the Court has only

entertained the appeal of an order which might be deemed interlocutory when the losing party would be irreparably injured if review was denied. *Republic Natural Gas, supra*, 334 U. S. at 68, 92 L. Ed. at 1220. The petitioners will not be precluded from petitioning the Court should the Trial Court rule against disclosing the informant's identity. Thus there is no irreparable injury. More recent cases may have broadened the exceptions. See *Local No. 483* v. *Curry*, 371 U. S. 542, 9 L. Ed. 2d 514, 83 S. Ct. 531 (1963); *Mercantile National Bank* v. *Langdeau*, 371 U. S. 555, 9 L. Ed. 2d 523, 83 S. Ct. 520 (1963); *North Dakota Pharmacy Board* v. *Snyder's Stores, supra*. However, in the latter case a close reading will show Justice Douglas was concerned because there was no way to preserve the constitutional question if the North Dakota Supreme Court judgment was held not final. *Snyder's Stores, supra*, 414 U. S. at 162, 38 L. Ed. 2d at 385. As stated above, the constitutional question in the case at bar will not be lost if the Court declines to rule that the judgment was final and thus not review the case.

In the former, it was held that the questions of jurisdiction and venue had been finally decided by the state courts below even though the whole case had not been finally determined. "In effect, such a controversy is a multiple litigation allowing review of the adjudication which is concluded because it is independent of, and unaffected by, another litigation with which it happens to be entangled." *Radio Station WOW, supra*, 326 U. S. at 126, 89 L. Ed. at 2099, The newer interpretations of 'finality' would seem "only to exclude cases where, because a determination appealed from could not be separated from the merits of the litigation, still pending before the state court, the Court in granting review would be passing on an issue not ripe for decision." 73 *Yale L. J.* 515, 526. The issue of disclosure in the instant case is inextricably

bound up in the merits of the litigation and is not susceptible of independent review. The petitioners themselves admit the informant's information is the crux of the whole matter and state that disclosure of the identity is necessary for cross-examination of the defendants and testing their probable defenses. Thus the issue of disclosure cannot be separated from the central cause of action. The issue has not been finally decided in the state courts. To avoid unwarranted interference jurisdiction should not be exercised.

POINT II

Jurisdiction should not be exercised inasmuch as the constitutional questions presented are premature and not ripe for decision.

The United States Supreme Court has continually followed the policy of not deciding constitutional questions unless it is absolutely necessary. See *Golden* v. *Zwickler,* 394 U. S. 103, 110, 22 L. Ed. 2d 113, 118, 89 S. Ct. 956 (1969); *Poe* v. *Ullman,* 367 U. S. 497, 503, 6 L. Ed. 2d 989, 996, 81 S. Ct. 1752 (1961); *Joint Anti-Fascist Refugee Committee* v. *McGrath* (Frankfurter concurrence), 341 U. S. 123, 154, 95 L. Ed. 817, 845, 71 S. Ct. 624 (1950); *Rescue Army* v. *Municipal Court City of Los Angeles,* 331 U. S. 549, 568, 91 L. Ed. 1666, 1678, 67 S. Ct. 1409 (1946); *Alabama State Federation of Labor* v. *McAdery,* 325 U. S. 450, 460, 89 L. Ed. 1725, 1734, 65 S. Ct. 1384 (1944); *Ashwander* v. *Tennessee Valley Authority* (Brandeis concurrence), 297 U. S. 288, 345, 80 L. Ed. 688, 710, 56 S. Ct. 466 (1935). "Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper

performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it." *Blair* v. *United States,* 250 U. S. 273, 279, 63 L. Ed. 979, 981, 39 S. Ct. 468 (1919).

In determining when review of a constitutional question is absolutely essential the Court has reiterated that it does not have the power to give advisory opinions. See *Golden, supra,* 394 U. S. at 108, 22 L. Ed. 2d at 117; *Ashwander, supra,* 297 U. S. at 346, 80 L. Ed. at 710. Its jurisdiction is limited to actual cases and controversies; a hypothetical threat is not enough. *Golden, supra,* 394 U. S. at 110, 22 L. Ed. 2d at 118; *McAdory, supra,* 325 U. S. at 460, 89 L. Ed. at 1734; *United Public Workers* v. *Mitchell,* 330 U. S. 75, 89, 91 L. Ed. 754, 767, 67 S. Ct. 556 (1946). Justice Brandeis, concurring in *Ashwander, supra,* 297 U. S. at 346, 80 L. Ed. at 710 stated:

> "The court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision."

Two of the rules are particularly pertinent to the case at bar: "(2) The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it' . . . (5) The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation." *Ashwander, supra,* 297 U. S. at 346-347, 80 L. Ed. at 711.

With reference to the former, to avoid anticipation, the controversy must be immediate and real, ripe for review when it is before the Court. "Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete

case involves too remote and abstract an inquiry for the proper exercise of the judicial function." *International Longshoremen's and Warehousemen's Union, Local 37* v. *Boyd,* 347 U. S. 222, 224, 98 L. Ed. 650, 652, 74 S. Ct. 447 (1953). The instant case in its present state is too remote and abstract an inquiry for consideration. In similar situations this has been the result reached by the United States Supreme Court. In *United Public Workers* v. *Mitchell, supra,* 330 U. S. at 93, 91 L. Ed. at 769 Justice Reed stated:

> "as no prior proceeeding, offering an effective remedy or otherwise, is pending in the courts, there is no problem of judicial discretion as to whether to take cognizance of this case."

In the present case there is a problem because there is a proceeding in the state court at the trial level which may in fact provide the petitioners with an adequate remedy. In a case last term, *Wheeler* v. *Barrera,* —— U. S. —— 41 L. Ed. 2d 159, 94 S. Ct. 2274 (1974), Justice Blackman speaking for the majority declined to render an opinion on the merits because the case had been remanded in the state court. The range of possibilities was too broad and the Court was reluctant to speculate as to what contingencies might arise. Similarly in the instant case, if the petitioners pursue their request for disclosure the defendants or the State could decide not to object. Or if the objection is made and there is a hearing to ascertain further facts the trial court could decide disclosure was required. Presently, it remains a matter of speculation which should not be reviewed at this time.

This leads to the fifth rule stated by Justice Brandeis in *Ashwander, supra.* Due to the premature nature of the petitioners' claim, they have not yet suffered any injury. Had the New Jersey Supreme Court ruled against

disclosure arguably they may have claimed injury. However, the decision was to remand the case to the trial court for further factual findings. The petitioners cannot meet the requirement set forth by Justice Frankfurter in *Poe* v. *Ullman, supra,* 367 U. S. at 505, 6 L. Ed. 2d at 997: "The party who invokes the power . . . must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement . . . *Massachusetts* v. *Mellon,* 262 U. S. 447, 488, 67 L. Ed. 1078, 1085, 43 S. Ct. 597 (1923)." Petitioners have failed to sustain the burden of demonstrating present injury or the immediate danger of injury.

The petitioners do not present this Court with a justiciable case. To grant review would go against the long established policy of not adjudicating cases which are not ripe nor immediate, but premature.

CONCLUSION

The respondents have not addressed the actual merits of this controversy in light of the compelling reasons for not granting the Writ of Certiorari. The case as presented by petitioners is not ripe for adjudication which is evidenced by the lack of a final judgment from the New Jersey State Supreme Court. For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

STEPHEN S. WEINSTEIN
A Professional Corporation
Attorney for Respondents, Frank Spann, Robert Bickley and John Dunne
By: STEPHEN S. WEINSTEIN